UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COALITION FOR TJ	
VS.	1:21-CV-296 CMH/JFA
	ALEXANDRIA, VIRGINIA
	SEPTEMBER 17, 2021
FAIRFAX COUNTY SCHOOL BOARD	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype, transcript produced by Julie A. Goodwin.

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(SEPTEMBER 17, 2021, 10:03 A.M., OPEN COURT.)

THE COURTROOM DEPUTY: Civil Action Number 21-CV-296, *Coalition for TJ versus Fairfax County School Board, et al.*

Counsel, please note your appearances for the record.

MR. KIESER: Christopher Kieser for plaintiffs -- plaintiff.

MS. REWARI: Good morning, Your Honor. Sona Rewari from Hunton Andrews Kurth for the defendant, and with me is Daniel Stefany, also from my firm, and Mr. Jeremy Shughart from the Fairfax County Public Schools. Mr. Shughart has provided a declaration in this case, and he is here to address any questions the Court may have.

THE COURT: All right.

MS. REWARI: Thank you.

MR. KIESER: And with me is Erin Wilcox, Alison Somin, and Glenn Roper, also for plaintiff.

THE COURT: All right.

This comes on on your motion.

MR. KIESER: Yes. Good morning, Your Honor, and I'll be brief. Chris Kieser for the Coalition for TJ.

When we were here in May with much the same body of evidence, this Court recognized the school board's overhaul of the admissions criteria for Thomas Jefferson High School was designed to effect the racial composition of the school. Since

that hearing, and the denial of the first preliminary junction motion, we learned an important new data point. The first year under the challenge plan, the Asian-American proportion of the admitted class at TJ fell by more than a quarter. Asian-Americans received almost 60 fewer seats at TJ, even though FCPS doled out 60 additional offers.

The new data confirmed that not only was the plan designed to effect the racial composition of the school, it succeeded in doing so to the great detriment of atrium -- Asian-American students. That purpose and effect means the Coalition is likely to succeed on the merits of its equal protection claim.

The Court declined to issue a preliminary injunction last time, as far as we understand, because it -- it was confident that -- Your Honor was confident we could reach a final decision in this case before an injunction would be necessary for the class of 2026. But with the admissions process scheduled to go into effect just -- begin in just over a month, on October 25th, a preliminary injunction is necessary now to preserve the status quo, the last uncontested status between the parties. It's far from guaranteed that a final decision on the merits would come early enough to provide effective relief for RA and the class of 2026, as the Coalition recognizes that the board's interest in not disrupting the established admissions process increase once the process

begins.

Preliminary relief now would avoid that problem. And the --

THE COURT: Now, I understand your concern, but this -- the final pretrial conference is set for the end of October. I can give you a January trial date, so we can have this decided in January.

MR. KIESER: Your Honor, that -- that would be, of course -- I mean, we would not object to that, of course, but I think even then at that point by January the board's interest in -- in not overhauling the -- the entire admissions process that started in October would perhaps make it difficult for the Court to issue an order, a prohibitory injunction enjoining the board's actions from last fall and essentially requiring the board to go back to the 2024 -- the class of 2024 admissions process when the current process had already started. And the -- and I would note that the current process has different eligibility requirements, so there are some people who would be eligible to apply under the old process who are not eligible.

THE COURT: But if some decision is made in January, that gives plenty of time for the process to be straightened out, doesn't it?

MR. KIESER: I mean, I -- I would recog -- I would just note that as time goes on it makes -- it's very -- much more difficult --

THE COURT: Well, I'm sure they're going to argue that, but I -- it seems to me in the posture we're in that kind of falls on deaf ears. I -- this is going to come up very quickly. And if it's determined that this process has been discriminatory, it seems to me there's plenty of time to change it.

MR. KIESER: Well, Your Honor, we would submit that the best time to change the process, at least for the class of 2026, would be before the process begins, and that is within the next five weeks. If we were to do it in January, the logistical issues that the board mentions in their brief would only increase, and the likelihood that the Court could order effective relief by the end of January would be much less. So I --

THE COURT: But the board's on notice. They understand that we're trying this case, and we don't know what the outcome is going to be yet, so they've got to be prepared for that, don't they?

MR. KIESER: I'm -- that's certainly true, Your Honor, but that's -- the same situation has been -- the same situation has existed since Your Honor denied the motion to dismiss in May, and yet even with this preliminary injunction motion, they make the same arguments about overhauling the admissions process at a late date. So I think those arguments continue even though I think the board's been on notice --

THE COURT: Well, those arguments are always going to be there, but it seems like that I'm in a -- in the same position that I am -- that I was before. I mean, what kind of disruption is it going to cause for me to give a preliminary injunction now? I've been in the same position I was before, it seems to me.

MR. KIESER: Well, I would submit, Your Honor, that a preliminary injunction now for the class of the 2026 process that is yet to begin is much less disruptive than say had you ordered a preliminary injunction in May for the old admissions process -- for the admissions process from last year, which was almost complete.

At this point, you could issue an order and -- and -- and there would be ample time to prepare to change the process for anything you might order. Whereas if you do it in January, that might not be the case. And if -- I think if the Court -- as you recognized in May, that disruption increases as time goes on.

So, we would submit that a preliminary injunction now would minimize the disruption and allow the Court to order a prohibitory injunction that goes into effect five weeks before the -- the admissions process begins. And that's -- that's our position on that. I mean, I understand if that's --

THE COURT: I understand your position.

MR. KIESER: And I guess, you know, as far as the --

the remaining factors, I mean, we think that -- we demonstrated that at least one Coalition member will suffer irreparable harm because if the Coalition is likely to succeed on the merits, then the -- the Coalition member's child will have to compete on an unequal playing field, and that isn't -- is the equal protection injury under *Parents Involved* and *Northeastern Florida*, so that's sufficient to satisfy the irreparable harm argument.

And then as far as the public interest and the balance of the equities, this case is against the government defendants, so those -- those -- and it's a constitutional case, so those factors merge. And generally speaking, the Fourth Circuit in *Legend Night Club* and in *Newsome* has waived the public interest in enforcing constitutional rights significantly more than government arguments to -- that they will be subject to hardship due to an injunction.

So we would submit that a preliminary injunction is -- all four *Winter* factors are satisfied and the preliminary injunction is -- is appropriate.

THE COURT: All right.

MR. KIESER: Thank you.

MS. REWARI: Good morning.

Your Honor, as you've recognized, you expressly ruled on this issue back in May, and there are really no grounds for reconsideration that are presented in the papers.

There's a suggestion that the Court miscalculated the timetable for this case. And when we were here in May, there wasn't even a scheduling order, so no one could have expected that this case would be decided by October.

And the schedule even back in May was known because Mr. Shughart supplied a similar declaration in May that explained that historically the old process would start in early September in order to be able to be completed in six months. And of course, then Your Honor issued a scheduling order in early June, and it showed the discovery cutoff was going to be October 15th. The parties submitted a joint discovery plan in which they sequenced discovery to be completed by October 15th. There was no request for expedited discovery or, you know, request to change the schedule at that time.

And we are now a month from the close of discovery, and we don't have any new evidence here that would warrant reconsideration other than the outcome of the last admission cycle, which I'll address because it doesn't show a disproportionate impact. But that -- that is the only ground that they have stated.

So, there's no way that anybody could have thought this was going to be decided by October, even when we were here in May. And the -- the rationale that we have the admissions results of the current process also doesn't support a

consideration. The last time we were here the Coalition argued for an injunction based on its own gloomy prediction that Asian-American students would comprise only 31 percent of the class of 2025, and that prediction came nowhere close to reality.

The results are in, and the proportion of Asian-American students in the class of 2025 is almost double that prediction. It was 54 percent, even though their proportion of the applicant pool was lower than it was the year before. They're still the majority of students, and Asian-American students have a larger share of the admitted class than their share of the applicant pool. So they have an even weaker argument now than they did back in May as to why the preliminary injunction would be warranted.

And last time the Coalition offered two declarations from two parents: One who had a child who was applying as an 8th grader, and one who had a child that was a 7th grader. And they have the same two parents' declarations again.

Now, tellingly, the parent who had the 8th grader is not saying that 8th grader didn't get in. That parent is now saying, I'm worried about my 7th grader a year from now not getting in. That child is not even eligible to apply for this and so wouldn't be affected by an injunction.

The second parent, the one who had a 7th grader

last year, is now saying, well, my 8th grader is going to apply. But -- and he talks about the high qualifications of his 8th grader, but there's no showing that that child is unlikely to get in absent an injunction. In fact, the school attended by that child had the highest number of students admitted in -- in the class of 2025, and so there is no changed circumstance that would warrant reconsideration here.

And, you know, we are talking as if it would be possible to completely revert to the 2019 process now. And as we pointed in our papers, and there's no dispute here, that the old process was based on three standardized tests, two of which are no longer available from the vendor. No one can get them. They're not being offered for 8th graders at all this year.

And so if the Court were to order a preliminary injunction, someone would have to figure out what is the process going to look like because we cannot use the 2019 process. Are there going to be standardized tests? What tests will those be? What scores will matter? How will we use those scores? All of that is -- are matters of educational policy. There's no expert to advise the Court on how to pick those. Is the board on an injunction supposed to now make those decisions in spring, this news on thousands upon thousands of unsuspecting 8th graders who are expecting for the Court -- for the board to follow the old process?

Mr. Shughart's declaration explains that last time

the School Board went through this three years ago when they had to switch tests because the tests they were using was discontinued by the vendor. The process took over a year. There was significant, significant community engagement: Lots of committees, lots of groups, lots of parent input. Lots of school administrator, school teacher input.

And so the idea that we could have an injunction today that would say, go pick some new tests, spring it on students who haven't been preparing, who had no idea that a standardized test could be coming, who are looking at the regulation that's been on the books to the public for months now saying that this is going to be the process, would be in a public interest, I think strains credulity, Your Honor, because this is not -- you know, they've said the balance of hardships and public interests merge when the government is a defendant, but in -- in many of those cases in terms of balancing the hardships, you're looking at is this an action that affects one person, the plaintiff, or the plaintiff's group, or are you enjoining something that could have consequences for students or for, you know, citizens beyond the people who are suing, and this would have significant adverse consequences for the children in Northern Virginia.

Fairfax County Public Schools is the defendant in this case, but the school that we're talking about is a school that is attended by students from five localities. The

counties of Loudoun, Arlington, Prince William, the City of Falls Church all send their students, and then we also have private schools.

Mr. Shughart 's declaration noted that last year we had 130 students from 130 schools apply to TJ admission, and so this impact would impact all of those students who are relying on the process that -- that is in the regulation.

And, you know, I understand that, as Your Honor pointed out, if the Court were to find discrimination and enter an injunction, all of these questions would have to be sorted out. But what is the sense in deciding them now and then re-deciding them if there's a different conclusion a few months from now?

You know, plaintiffs have read a lot into Your Honor's comments from the bench. Last time the same sentence from your -- from the transcript is quoted five times in two briefs. And, you know, I've looked carefully at what Your Honor said, and it's clear to me from the transcript that you were addressing the allegations of -- of what is alleged in the case and not making a pronouncement from the bench on a motion to dismiss that -- that this is a --

THE COURT: Well, you're correct about that. I've made no findings of fact in this case at all, other than the findings that I made in regard to the temporary restraining order that I looked at initially.

MS. REWARI: Yes, and that's how I read your remarks, and that's how we received your remarks. And so we expect that there will be a full decision on the merits in this case, and if the -- Your Honor is able to take us in January, we're -- we're -- you know, we're happy to have it tried in January, but creating two rounds of uncertainty for students thousands upon thousands of students who are impacted by this.

And -- and I would also note that this is a process that has lots of components. Right? There's elimination of the hundred dollar application fee. There's no -- there's nothing about that that is racially discriminatory on its face. There's no evidence that's -- that was intended to advantage or disadvantage any group.

You have to be very cynical to say that that is a proxy for race. There's no evidence that that's a proxy for race. So you could have a process that -- that -- you know, even if the Court were to rule adversely against the School Board in January that says, you can keep that elimination of the fee, there's nothing wrong with that, and that has a huge impact. This year's class has 25 percent of economically disadvantage students, a number that's never been seen at TJ which has been historically very, very low, and nothing like the student population that you see in Northern Virginia.

So this has had a huge impact on the students who are eligible. And for the Court to now enjoin it would --

would have terrible consequences.

There's -- you know, there's another part of the plan. For example, there's also the lack of -- you know, the absence of teacher recommendations. Again, is that a proxy for race? There's no argument how that's a proxy for race.

There's a one -- there's -- the board chose a plan that is guaranteed to provide seats for eligible candidates from each middle school in Fairfax County. For the first time in at least 15 years, the TJ class of 2025 has students from every single middle -- public middle school in Fairfax County, 26 of them.

Again, there's no argument, there's no evidence that that is a proxy for race. But in Mr. Dec -- Mr. Shughart's declaration shows that historically the lion's share, more than 87 percent of the seats went to 8 out of 26 middle schools. And while the plaintiffs have argued -- or plaintiff has argued, well, Asian-American students are clustered in just a few -- a few schools, we've provided evidence in our papers that's not true. The number of the schools they pick look a lot like other schools in terms of the number of Asian-American students, the proportion of Asian-American students in the population that have historically sent few, if any, students to TJ.

And, Your Honor, you received a brief from a number of amici that echo this point, and, in fact, show that there

are large segments of the Asian-American, to the extent you're going to call Asian-Americans a single community, there are segments of that community or sub-groups within the Asian-American community that have benefitted from these changes, and they would support these changes. So the idea that the -- the plaintiff here represents the interest of Asian-American students is one that we would not agree with.

There's -- there's also -- you know, we disagree on the likelihood of success on the merits. And I'm happy to address it if the Court wants to, but, you know, failure to meet any of the elements under *Winter* requires denial of the injunction. And I think the balance of hardships and the public interest here strongly disfavor an injunction.

THE COURT: All right.

MS. REWARI: Thank you.

THE COURT: Anything you want to respond to?

MR. KIESER: Your Honor, I would make it just a couple of points because I think on -- oh, sorry with the mask.

I think on the balance of equities and -- and the public interest, we've -- we've sort of covered those points. And -- and our position is still that, you know, in January there may not be any way to -- to award effective relief for the class of 2026 at TJ because of the fact that the process will have gone all the way through at that point, or almost all the way through.

And, you know, my friend on the other side talks about, you know, the fact that they would have to find these two new tests, but that -- that's going to be an issue in January too, so -- and maybe even more difficult to do that in January when you need to tell people by June whether they got into TJ, so an injunction now would at least make the process a little more smooth. And at least -- I mean, as we've talked about, they've been on notice since May, so it's been what now, six months that there's been a possibility that this might be enjoined at some point? An injunction now would at least, you know, give some clarity for the students who are applying before the application process begins.

I just want to also address the disparate impact point because I think under their -- their theory that the drop from 73 percent to 54 percent isn't a disparate impact. It is essentially saying that you can benchmark a racial -- racially balanced class and say, well, as long as they're still performing above that, that racial balance, whether it be the proportion of students in Fairfax County Public Schools as a whole or the applicant pool, then -- then the process or the board's actions were not discriminatory. But as the -- especially as the order that we submitted as Exhibit 2 to the reply brief, the *AFEF versus Montgomery County Board of Education* explains, that's not the proper standard for disparate impact under a -- in an *Arlington Heights* case. It's

the effect of the actual decision.

So, here we have, you know, six years in a row where there's only one year where the Asian-American proportion of students at TJ was below 70 percent, and now it's 54 percent. That's a significant drop regardless of previous projections. I mean, I think everyone would acknowledge that it's very -- it was very difficult to project the outcome of what would happen here because of the holistic factors that go into evaluation, and so the 54 percent, which is in line with the superintendent's prediction for his Merit Lottery Proposal still represents a more than a quarter decline in the -- compared to the previous two years, class of 2024 and the class of 2023. And any -- and their -- under their theory, essentially as long as Asian-Americans were doing better than the -- than the racial balance of the applicant pool, then there could be no discriminatory intent. And I don't think that that's the proper reading of *Arlington Heights*, *Feeney*, and *McCrory*.

But if this comes down to the -- the balance of the equities, I think our position is essentially the same as before that, that effective relief has to happen now, and in January there's no guarantee that there could be effective relief for this -- this class. I mean, the Court could order relief for the -- for the subsequent classes at that point and -- and we would certainly hope that the Court could order

relief for 2026 of that -- the class of 2026 at that time, but we would just submit that it would be more difficult to do so. And so then an injunction now would solve that problem.

Thank you, Your Honor.

THE COURT: All right. I understand your position, but I believe I'm in the same position that I am before. I believe that the -- my entering of a preliminary injunction at this time may cause more harm than good and might cause more harm than leaving things alone. It certainly looks like it would to me.

I mean, we can try this case in January and get a decision. It seems to me that that's plenty of time to get corrected whatever needs to be corrected, if that's warranted from the findings after the trial of the case.

So your motion for a preliminary injunction will be denied.

All right.

MR. KIESER: Your Honor, we did want to talk quickly about the pretrial, about the date for the pretrial conference.

THE COURT: Go ahead.

MR. KIESER: We have a conflict for the current date, and I think we've -- we talked about October 28th as a possible change for that. Would that be possible to move it back to October 28th?

THE COURT: Well, I'll do it on a Friday for you.

What's the date of the conflict?

MR. KIESER: It's currently the 21st. We can move it to the -- yeah, we can move it to the --

MS. REWARI: Your Honor, excuse me. I'm sorry. I'm scheduled to attend the Boyd-Graves Conference in Virginia on the 29th, so I wouldn't be able to do the 29th.

THE COURT: Well, let me look here just a minute. Maybe we can -- does that include the 28th too?

MS. REWARI: No, it does not, Your Honor.

THE COURT: What about October -- are you available on the 22nd, Friday the 22nd?

MR. KIESER: No, ours is the 20th through the 22nd. We're -- we have a firm-wide retreat that we all have to be there.

THE COURT: Oh.

MR. KIESER: So it's the 20th through the 22nd.

THE COURT: Well, I can do it for you -- well, you can't do it on the 28th though. You want to do it the 25th or the 26th?

MR. KIESER: We can do the 28th.

MS. REWARI: Yes, Your Honor, I can do the 28th as well. I just can't do the 29th.

THE COURT: Oh, you can do the 28th too. Okay.

MS. REWARI: Yes, yes, I can do the 28th.

THE COURT: All right. We'll move it to the 28th --

MR. KIESER: Okay. Thank you.

THE COURT: -- at 10:00 o'clock.

MR. KIESER: Thank you, Your Honor.

MS. REWARI: Thank you.

THE COURT: All right. Anything else?

MR. KIESER: Not at this time, no.

THE COURT: All right. Thank you.

We'll adjourn until Monday morning at 10:00 o'clock.

THE LAW CLERK: All rise.

(PROCEEDINGS CONCLUDED AT 10:31 A.M.)

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UNITED STATES DISTRICT COURT)
EASTERN DISTRICT OF VIRGINIA)

I, JULIE A. GOODWIN, Official Court Reporter for the United States District Court, Eastern District of Virginia, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above matter, to the best of my ability.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

Certified to by me this 5TH day of OCTOBER, 2021.

/s/
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